

NO. 83-1346

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

POLEATE BAHAM, JR.  
IRVEN COUSIN, AND  
JACQUELINE CARR

VERSUS

HON. DAVID C. TREEM, GOVERNOR,  
STATE OF LOUISIANA  
HON. WILLIAM FRENCH SMITH, ATTORNEY GENERAL  
OF THE UNITED STATES  
HON. WILLIAM J. GUSTE, JR. ATTORNEY GENERAL  
STATE OF LOUISIANA  
HON. BRUCE E. UNANGST, PRESIDENT  
ST. TAMMANY PARISH  
HON. W. A. "PETE" FITZMORRIS, CHAIRMAN  
ST. TAMMANY PARISH COUNCIL  
HON. JAMES H. BROWN, SECRETARY OF STATE,  
STATE OF LOUISIANA  
HON. JERRY FOWLER, COMMISSIONER OF ELECTIONS,  
STATE OF LOUISIANA  
HON. LUCY REID RAUSCH, CLERK OF COURT  
PARISH OF ST. TAMMANY 22ND  
JUDICIAL DISTRICT COURT

ON DIRECT APPEAL FROM THE ORDER DENYING  
PRELIMINARY INJUNCTION FROM UNITED STATES  
DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA

MOTION TO DISMISS BY RESPONDENTS

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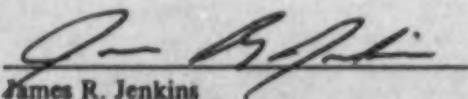
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## MOTION TO DISMISS

On motion of Respondents, Bruce E. Unangst, President of St. Tammany Parish and W. A. "Pete" Fitzmorris, Chairman of the St. Tammany Parish Council, appearing herein through counsel of record, James R. Jenkins, and on suggesting to this Court that the appeal of petitioners from the order denying injunctive relief before the three-judge court of the United States District Court, Middle District of Louisiana, lacks the necessary jurisdiction before this Court and accordingly, said appeal should be dismissed.

Covington, Louisiana, this 16th day of April, 1984.



James R. Jenkins  
Assistant District Attorney  
22nd Judicial District of Louisiana  
Attorney for Respondents,  
Bruce E. Unangst and  
W. A. "Pete" Fitzmorris  
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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

This action was brought by petitioners before a three-judge court seeking injunctive relief to enjoin the election held on October 22, 1983. Trial was held in this matter on October 18, 1983 after which the Court issued an order denying the petitioners' motion for a preliminary injunction. In the order of denial, the Court expressed no opinion on the merits of the case reserving such for a further hearing to be held on November 1, 1983 should the United States Justice Department refuse or fail to preclear the process of recertification of candidates. On October 28, 1983, the United States Justice Department precleared the recertification process which in accordance with the Court's order of October 18, 1983, made moot any substantive question before the Court. It is from the Court's denial of petitioners' motion for preliminary injunction that petitioners are appealing to this Supreme Court.

Petitioners are not entitled to a direct appeal to this Court from a three-judge district court when the lower court denies a preliminary injunction and disposes of the case without reaching the merits. *MTM, Inc. v. Baxley*, 95 S.Ct. 1278, 420 U. S. 799, 43 L.Ed. 2d 636 (1975). In that case, this Court held that a direct appeal based on 28 U.S.C. 1253 from an order of a three-judge federal court denying interlocutory or permanent injunctive relief will be allowed only where such order rests upon resolution of the merits of a constitutional claim. In the instant case, first, the three-judge court denied the requested relief without a decision on any of the merits and second, the Court was presented with a statutory question, that being whether 42 U. S. C. 1973(C) required preclearance from the Justice Department of the state court candidate recertification judgment. The three-judge court was not convened to hear a constitutional claim.

To allow petitioners a direct appeal to this Court would greatly enhance the mandatory docket and would therefore, be contrary to the historical policy of this Court of minimizing its mandatory docket, a policy of long standing with the Court which has also been encouraged by Congress by limiting direct appeal jurisdiction to the Supreme Court in its jurisdictional acts. See *Gonzales v. Automatic Employees Credit Union*, 95 S.Ct. 289, 419 U.S. 90(1974).

The three-judge court in its order, declared all issues in the request for injunctive relief moot upon preclearance of the state court judgment by the Justice Department. Preclearance was obtained on October 28, 1983 which made the order of mootness operational and mandatory. The three-judge court based its order on the Supreme Court decision of *Berry v. Doles*, 98 S.Ct. 2692, 438 U.S. 190, 57 L.Ed.2d 693 (1978).

Petitioners are without jurisdiction in this Court to assert their appeal. Any appeal claim they have should have been directed to the United States Court of Appeals for the Fifth Circuit, the appropriate court of jurisdiction in this particular case. Consequently, this Court should deny petitioners' appeal for the herein cited reasons and authorities.

RESPECTFULLY SUBMITTED,

  
James R. Jenkins

Assistant District Attorney  
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428 East Boston Street  
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**CERTIFICATE OF SERVICE**

I CERTIFY that copies of the foregoing brief of Motion To Dismiss By Respondents have this day been served on Jacqueline Carr, Attorney for Petitioners, P.O. Box 550, Slidell, Louisiana, 70459; Cynthia Young, Assistant Attorney General, State of Louisiana, P.O. Box 44005, Capitol Station, Baton Rouge, Louisiana; Shelly Zwick, Assistant United States Attorney, 352 Florida Street, Baton Rouge, Louisiana; and Tom Derveloy, Attorney, 202 Columbia Street, Covington, Louisiana 70433, by placing said copies in the United States Mail, postage prepaid and properly addressed, this 18th day of April, 1984, at Covington, Louisiana.



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**JAMES R. JENKINS**